

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LESLIE CARTER and DEPARTMENT OF THE NAVY
PUGENT SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 02-1101 Submitted on the Record;
Issued October 10, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs used the correct rate of pay in determining appellant's compensation benefits.

On May 22, 1997 appellant, then a 48-year-old pipe fitter, filed a claim for a traumatic injury to his left knee in the performance of duty on May 21, 1997. The Office accepted the claim for left knee effusion and loose body in the left knee. The Office placed appellant on the periodic rolls and paid appropriate compensation benefits.

Appellant received vocational training and returned to work in the private sector in the job of a tool and die maker on May 8, 2000.

By decision dated August 8, 2000, the Office issued a formal loss of wage-earning capacity (LWEC) decision reducing monetary compensation to reflect appellant's earning capacity in that job. The Office found that the position of tool and die assistant fairly and reasonably represented appellant's wage-earning capacity. The Office found that, since May 8, 2000, appellant had earned \$401.35 per week, with a current weekly pay rate for the date-of-injury position of \$594.39 and an adjusted earning capacity a week of \$391.63. The Office determined that this resulted in a loss of wage-earning capacity of \$184.30 a week, with cost-of-living increases, adjusted upward to \$144.25 or \$577.00 every four weeks, minus insurance premiums, for total compensation in the amount of \$474.46 every four weeks.

By letter dated September 1, 2000, appellant disagreed with the pay rate used for compensation purposes and requested a hearing, which was held on January 17, 2001.¹

By letter dated February 13, 2001, the employing establishment stated that the apprenticeship program at the shipyard had changed from the learner's program as defined in section 8113 of the Federal Employees' Compensation Act. Ms. Dumas, an employing establishment administrator, advised that an employee was hired in a career ladder promotion program as a WG-O1. She advised that, after successfully completing on the job experience and the training required to become a WG-O3, an individual was promoted to WG-OS, then to WG-O8 and finally to WG-10 after successfully completing the program. Ms. Dumas stated that there was no guarantee that an individual would ever complete the program and the individual could decide to drop out of the program at the WG-OS or WG-O8 level. She stated that this change was made to enable the employer to have not only journeyman level positions filled, but also to fill positions at the lower levels. Ms. Dumas explained that the program gave flexibility to managers that were not present in the old apprentice/learner program. Further she advised that although the people in the program were still informally referred to as apprentices, they were not technically apprentices. The apprentice program was a four-year program with step increases every six months.

In a March 4, 2001 response, appellant's representative argued that, notwithstanding the employing establishment's letter, appellant was an apprentice when the injury occurred. He inferred that the employing establishment's statement that appellant's program was the same as a career ladder program was incorrect, because that was not how the program at the shipyard worked.

By decision dated March 29, 2001, the Office hearing representative found that the correct rate of pay was used to compute compensation. The hearing representative found that appellant was not in a learner's capacity position that would entitle him to automatic promotion at the WG-10 level and affirmed the Office's August 8, 2000 decision.

The Board finds that this case is not in posture for a determination as to whether appellant was employed in a "learner's capacity" at the time of his injuries so as to entitle him to additional compensation under 5 U.S.C. § 8113(a).

Under the Act, compensation is based on an employee's monthly pay, which is defined under section 8101(4) of the Act as the greatest of the rate of pay at the time of injury, the rate of

¹ At the hearing, appellant asserted that he was a pipe fitter apprentice when he was injured. He provided a copy of a notification of personnel action dated July 6, 1997 indicating that he was a student trainee pipe fitter and received a special award in the amount of \$150.00 dollars. Appellant asserted that he was in a formal apprenticeship program when the injury occurred and was in a learner's status at that time. He explained that the apprenticeship program was three years and was comprised of two years in school and one year of waterfront experience. He also explained that the program was a coop program in which one went to school for four days and worked on the waterfront for six days. Appellant stated he would have graduated and become a pipefitter in June 1999. Appellant indicated that he had started the program in December 1995, and was in the program for approximately a year and a half when he was injured. Appellant also stated that he should receive night differential because he worked the swing shift for six weeks around February 1997.

pay at the time disability begins or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time employment with the United States.² However, section 8113(a) of the Act provides:

“If an individual --

(1) was a minor or employed in a learner’s capacity at the time of injury; and

(2) was not physically or mentally handicapped before the injury;

the Secretary of Labor, on review under section 8128 of this title after the time the wage-earning capacity of the individual would probably have increased but for the injury, shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity.”³

In *Carter C. Swinson*, the Board first delineated the circumstances under which an employee would be considered to be in a learner’s capacity. In finding that the employee in that case, who was rerated as a “helper -- machinist, trainee” on December 8, 1941, was not in a learner’s capacity when he was injured on December 19, 1941, the Board stated:

“The employing establishment advised that in 1941 the only formal training program for machinists was the apprenticeship program in which appellant was not enrolled; that the job classification of ‘helper-machinist’ was not an ‘in-training’ position; that while some helpers were promoted to machinists on the basis of demonstrated ability, the majority were not so advanced; that there was no specified period in which a helper-machinist attained the rating of a machinist as this depended upon the individual’s qualifications and recommendation of his department; and that appellant’s rerating of December 8, 1941, was based on satisfactory completion of periods of work as a helper rather than because of any advancement under a formal or informal training program.”

There is nothing in the official records to establish that appellant’s designated job was anything other than that of “helper-machinist” when injured. Even though the facts and affidavits presented may warrant a finding that at the time of the injury he was designated a “trainee,” it does not follow that such a designation or the designation “helper” is sufficient to render him a “learner” within the meaning of the Act. The title given to a job is not, of itself, determinative of the issue, nor does the fact that the employee was engaged in an unskilled job, which may or may not ultimately lead to a position in a semi-skilled or skilled craft, bring him within the contemplation of the term “learner” as used in the Act. A “learner” under the Act does not contemplate a category in which the worker can remain for the rest of his life.

² 5 U.S.C. § 8101(4).

³ 5 U.S.C. § 8113(a).

According to the record appellant's job was such that he could have remained at this "helper -- machinist, maximum" rating for an indefinite period or, in fact, the remainder of his life.⁴

In *James L. Parkes*, the Board further described the circumstances under which an employee would be considered to be in a learner's capacity. In finding that the employee in that case, who was employed as a research analyst, was not in a learner's capacity, the Board stated:

"[Appellant] was not a participant in a formal training program with a specified period for completion upon which he would have automatically moved to a higher grade; he could have remained at the same GS grade level for an indefinite period and any advancement achieved would have been contingent upon his proven ability, past experience, or other qualifications. Appellant's status was no different from any other regular employee in that the opportunity of advancement to a higher grade was dependent upon demonstrated ability, merit and availability of job. The circumstances here do not warrant a finding that he was a 'learner' so as to entitle him to an increase in the 'monthly pay' upon which to compute compensation for his disability."⁵

As in the *Parkes* case, appellant alleged that he was a participant in a formal training program with a specified period for completion at which time he would have automatically been promoted to a higher grade. He provided documentation, which indicated that he was a pipe fitter trainee and received an award. Further, the employing establishment confirmed that the apprenticeship learner program had changed to a career ladder program. The record, however, does not reveal when this occurred. The Office assumed that, since the program had changed, the apprentice program was no longer applicable to appellant and did not proceed to inquire further to ascertain the date the program was changed. However, once the Office has begun investigation of a claim, it must pursue the evidence as far as reasonably possible, particularly when such evidence is in the possession of the government employing establishment and is, therefore, more readily accessible to the Office.⁶ Without inquiring further, the Office improperly relied upon the employing establishment's February 13, 2001 letter indicating that the program had changed without determining whether it was in effect at the time appellant was injured and improperly found that the correct wage rate was used.

Accordingly, the case will be remanded to the Office for a determination as to the exact date when the apprenticeship program changed to a career ladder program and recalculation of the pay rate at the time of injury in accordance with 5 U.S.C. § 8113. After such further development as the Office deems necessary, it should issue an appropriate decision with regard to the issue presented.

⁴ *Carter C. Swinson*, 10 ECAB 281, 282 (1958).

⁵ *James L. Parkes*, 13 ECAB 515, 517 (1962); see also *Robert Allan*, 30 ECAB 1154, 1156-57 (1979); *Raymond W. Goodale*, 25 ECAB 350, 353 (1974).

⁶ *Leon C. Collier*, 37 ECAB 378 (1986); *James M. Weems*, 9 ECAB 315 (1957).

The March 29, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
October 10, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member